But Mr. Rintoul, while very properly conceding the point raised by the appellant, submitted other grounds by which he argued that the decision to acquit should stand, albeit arrived at by wrong premises.

The first point concerns the charge, and quite clearly the charge is wrong. Apart from the omission to state the place of the offence (section 153 of the Criminal Procedure Code), it alleges the carrying of goods weighing 161 cwts. 195 lbs *in excess* of the authorised weight of 135 cwts. Obviously the intention was to charge an excess of some 26 cwts. The poundage defeated me; the petition refers to 195 lbs; the charge to 105 lbs; and Mr. Olver's subtraction (W.P.2) gives 135 lbs. I should state, as regards the charge, that it does not appear to have misled the defendant-respondent, and I think it could be cured by virtue of section 422 of the Criminal Procedure Code.

But the next point is more serious. It has been ruled in this Court in the case of *Loo Chin San alias Lee Chin Han v. the Public Prosecutor*[2] that the production of the original haulage permit is essential. It is a ruling subscribed to by the learned Deputy Public Prosecutor, and must be observed. In this case a copy only was tendered and admitted. This copy appears to be certified true by Mr. Olver who describes himself over a rubber stamp as the Commissioner of Road Transport. I do not think this is correct. The original can always be obtained from a defendant on due notice given.

The next point is the designation of the defendant in the Court below. If the haulage permit is in fact a true copy, the original was issued to "Ginder Singh and Chet Singh T/A Seremban Transport Company". In the Court below the charge is against Ginder Singh and Chet Singh as individuals, but according to the evidence of the first witness for the prosecution Chet Singh is dead. Who then should be correctly named as the defendants? The partnership, if one existed, of Ginder Singh and Chet Singh terminated on the demise of the latter. It certainly seems a matter of some doubt, and the Magistrate seems to have acquitted one defendant who for some time has been beyond the jurisdiction. Indeed it would appear that the Court below dealt with the case as only against Ginder Singh, whereas it is at least probable and possible that the real defendant is the Seremban Transport Company. It may be that if so summoned, the same person, Ginder Singh, would appear, but any finding would not be against him personally. On the other hand the haulage permit may be held to have been issued personally to the two individuals named therein, although I presume that such permits are in constant issue to companies.

There is one other matter which although not raised in the appeal requires mention. It concerns the direction of the lorry to the Police Station by the Assistant Transport Officer (W.P.2). Inquiries from the Road Transport and from the Police failed to discover any authority by which the Assistant Transport Officer may stop and direct traffic. I presume the necessary authority must exist, or a responsible officer such as Mr. Olver would not so act.

Lastly the record discloses no plea, and the finding should not be prefaced by the expression "In my opinion", it is an unequivocal and conclusive act.

The appeal is upheld. The finding of not guilty, acquitted and discharged is set aside. The case is remitted to the Court below with directions that in a charge of contravening regulation 6 (now by amendment regulation 7) of the Motor Vehicles Commercial Use Regulations *mens rea* is not an ingredient; the prohibition and duty are absolute. The case should be re-tried, and consideration given to the amendment of the charge. In proof and procedure observance should be given to this judgment.

Re-trial Ordered.

TAN SHU EN AND ANOTHER v. PUBLIC PROSECUTOR.

[App. Crim. Juris. (Willan, C.J. Federation of Malaya, Bostock-Hill and Briggs, J.J.) September 2, 1948]
[Penang — Criminal Appeal No. 57 of 1947]

Opium and Chandu Proclamation Ss. 3(3) 18, 23 — Possession of Chandu — Knowledge of possession — Whether Customs Officer and Outdoor Officers are Police Officers — Statements to Customs Officer and Outdoor Officers — Confessions — Evidence Ordinance Ss. 17(2), 25 and 26.

This was an appeal from a conviction by the District Judge, Penang, for possession of opium. The appeal was referred to the Court of three Judges. The opium in this case was found in the luggage boot of Motor Car P. 776 which belonged to the second appellant. This first appellant was a brother of the second appellant. The questions raised on appeal were:—

(a) Was the confession made by the second appellant to Mr. Kandiah a Customs Outdoor Officer admissible in evidence?

(b) Was the confession made by the second appellant to the Senior Customs Officer admissible in evidence?

(c) If the answers to questions (a) and (b) are not in the negative, was there sufficient other

evidence to prove that the appellants were in possession of the opium?

Held, (1) that a Chandu Officer under the Opium and Chandu Proclamation is a Police Officer for the purposes of Sections 25 and 26 of the Evidence Ordinance; (2) that the confession made by the second appellant to the Outdoor Officer was made to a Police Officer below the rank of Inspector and was inadmissible by virtue of Section 25 of the Evidence Ordinance and as it was made while the second appellant was in custody was also inadmissible by virtue of Section 26 of the Evidence Ordinance; (3) that the confession made by the second appellant to the Senior Customs Officer was made while he was in the custody of a Police Officer and was therefore inadmissible by virtue of Section 26 of the Evidence Ordinance; (4) that to prove possession under Sections 3 and 18 of the Opium and Chandu Proclamation it is necessary to prove, (a) that the accused had actual or potential physical control of the opium or chandu, and (b) that he had the intention to exercise such control; (5) that there was no evidence in this case to prove that the first appellant knew he had possession custody or control of the opium and therefore his conviction cannot stand; (6) that apart from the statements to the Chandu Officers which were inadmissible there was no evidence to support the conviction of the second appellant and therefore his conviction must be quashed.

Cases referred to :—

(1) *Jubri bin Haji Salleh v. Public Prosecutor* (1947) 13 M.L.J. 88.

(2) *Rasiah v. Public Prosecutor* (1931-1932) F.M.S.L.R. 45.

(3) *Nanoo Sheikh Ahmad v. Emperor* (1927) I.L.R. 51 Bombay 78.

(4) *Hakam v. Emperor* A.I.R. (1940) Lahore 129.

(5) *Pharbo v. Emperor* A.I.R. (1932) Sind 201.

(6) *Sambu v. Rex* (1947) 13 M.L.J. 16.

(7) *R. v. Liew How Yeong* (1938) 7 M.L.J. 213.

CRIMINAL APPEAL.

R. D. Hume for the first Appellant.

F. G. Pooley for the second Appellant.

C. Wylie (Federal Counsel) for the Respondent.

The judgment of the Court of Appeal was given by :—

Willan, C. J. : — In this case the two appellants were convicted by the learned District Judge, Penang, of being in possession of opium in the luggage boot of motor-car P. 776, an offence contrary to sub-section (3) of section 3 of the Opium and Chandu Proclamation No. 49. The first appellant was sentenced to 18 months simple imprisonment and the second appellant to 2 years simple imprisonment. An order of forfeiture was made under section 17 of the Proclamation as regards both the opium and the car.

They both appealed against their convictions and sentences to the High Court. During the hearing of the appeal the Judge of the High Court decided, under sub-section (3) of section 306 of the Straits Settlements Criminal Procedure Code, to reserve the hearing of the appeal to a Court of three Judges.

The facts in this case are that the second appellant is the owner of motor-car P. 776 and the first and second appellants are brothers. On the day in question both the appellants (according to the prosecution) proceeded in car P. 776 to the office of the second appellant about 9.30 a.m. On arrival according to the prosecution evidence the second appellant went straight into his office and it is common ground that he had nothing further to do with that car until about 12.15 p.m. to 12.30 p.m. His connection with the car at those times is set out later in this judgment. At 9.30 a.m. the first appellant opened the doors of Godown No. 7, which is about 50 feet distant from the office of the second appellant, and drove the car into that Godown. He locked that Godown and went into the office of the second appellant. From that time the movements of the car came under the observation of several Chandu Officers. During the course of that morning, after the car had been parked in Godown No. 7 on the 9.30 a.m. trip, it appears to have been taken out of the Godown and used in Penang, but the particular movements of the car which concern us are when it was driven to that Godown about 12.15 p.m. to 12.30 p.m. by the first appellant. He was alone in the car at that time. On arrival at the Godown he opened the doors and drove the car inside. At that particular time the movements of the car were being closely watched by four Chandu Officers, who gave evidence for the prosecution at the trial of the two appellants.

At that time there is no doubt as to the actions of the first appellant. It is clear from the evidence that he drove the car into Godown No. 7. When the car was inside the Godown, with the engine still running (the first appellant was manoeuvring the car inside the Godown so that it could be driven straight out again) one of the Chandu Officers went into the Godown, got on the running board of the car, ordered the first appellant to stop the car and to get out. The first appellant obeyed that order.

Whether the second appellant was inside the Godown when this happened is in dispute. On the evidence the District Judge made a finding that the second appellant went inside the Godown (a) as soon

as the first appellant opened it, and (b) before the second appellant had noticed the presence of the Chandu Officers, all of whom, according to the finding of the District Judge, were then outside the Godown.

We propose to deal with this question at once in order to decide whether that finding of the District Judge is correct.

Turning first to the defence, the second appellant gave evidence that he only went to the Godown after one of his clerks went into his office and said there was a commotion in the Godown. That evidence is supported by the clerk who said that whilst he was having coffee at a stall near the Godown he saw the door of the Godown was open and that there were some people inside. This clerk said that he went to the office of the second appellant and told him what he had seen, whereupon the second appellant went to the Godown.

If the evidence of the defence is to be believed the inference to be drawn is that the second appellant had nothing to do with the car at that particular time and that he only went to the Godown after the Chandu Officers had stopped the car and had told the first appellant to get out of the car.

Turning now to the evidence of the prosecution on this particular question — there is the evidence of the four Chandu Officers — that evidence is as follows :—

(a) **Prosecution Witness No. 2.** — He said that when he reached the door of the Godown he noticed the car was turned, that it was still moving and was about to come out of the Godown. He saw a Chandu Officer get on the running board of the car and heard him order the first appellant to stop the car. In the Godown he saw the second appellant standing in the centre of the Godown behind the car.

(b) **Prosecution Witness No. 3.** — He said he went to the Godown and inside saw the Chandu Officer standing on the running board of the car. Inside the Godown he also saw the first appellant seated in the driving seat of the car and the second appellant was standing behind the car. At that time the engine of the car was still running.

(c) **Prosecution Witness No. 4.** — He said he saw the first appellant drive the car into the Godown and that he, this witness, followed the Chandu Officer who got on the running board of the car in the Godown. When this witness entered the Godown he saw the second appellant in the centre of the Godown behind the car.

(d) **Prosecution Witness No. 5.** — He said he went with Prosecution Witness No. 4 to the Godown. He saw the car in the Godown moving outwards towards the door, with its bonnet facing the door. He went inside the Godown, got on the running board of the car and ordered the driver, first appellant, to stop the car. When he got on the running board of the car he saw the second appellant already in the Godown, 2 or 3 paces behind the car.

These four Chandu Officers also gave evidence that they saw two other Chinese in the Godown. We are not concerned with these two other Chinese because they were released later after inquiries had been made.

Reverting to the evidence of the second appellant on this particular question, he, himself, said that when he first saw the car it was stationary with the engine still running and that the first appellant was then in the car.

From this evidence we have no doubt whatsoever that the finding of the District Judge, that the second appellant went into the Godown as soon as the first appellant opened it, and before the second appellant was aware of the presence of the Chandu Officers, is a correct finding. We have equally no doubt that the evidence of the second appellant and his clerk that the second appellant only went into the Godown after having been told by his clerk there was a commotion is untrue.

In the Godown, the second appellant made certain statements to Mr. Kandiah, the Chandu Officer who had boarded the running board of car P.776, and part of those statements amounts to a confession that the second appellant knew there was opium in the luggage boot of his car P.776. This is because of sub-section (2) of section 17 of the Evidence Ordinance, which is as follows :—

> A confession is an admission made at any time by a person accused of an offence, stating or suggesting the inference that he committed that offence.

Although at the trial the second appellant denied that such statements had been made, and further denied that he had any knowledge of opium being in the car, we are satisfied that the prosecution's evidence on this point was substantially correct and that the statements were made as alleged. Immediately before the making of those statements, Mr. Kandiah, who was the senior and in charge of the party of Chandu Officers, had told two of them to guard the entrance of the Godown. From that moment it is clear, and the learned Deputy Public Prosecutor very properly conceded, that the appellants would not have been permitted to leave the Godown, but would have been arrested or otherwise restrained if they had attempted to do so.

At the trial the statements made by the second appellant, including that part which amounts to a confession, were admitted in evidence and one of the important questions to decide in this appeal is whether this evidence was rightly admitted. This question is decided later in this judgment.

Continuing with the facts, Mr. Kandiah left the other three Chandu Officers in charge of the Godown with instructions that no one was to be allowed to enter or leave the Godown. He then went to report to a Senior Customs Officer. The Senior Customs Officer and Mr. Kandiah arrived back at the Godown about 1.20 p.m.

On arrival at the Godown the Senior Customs Officer found the remaining three Chandu Officers still on guard, and both the appellants and two other Chinese were inside the Godown. These are the two Chinese mentioned earlier in this judgment, but they can be dismissed from consideration because, after making inquiries, the Senior Customs Officer released them.

The first appellant informed the Senior Customs Officer that he was the driver of the car P.776. The second appellant made a statement to the Senior Customs Officer and part of that statement suggests the inference that the second appellant knew there was opium in the car. Therefore, this also amounts to a confession by virtue of sub-section (2) of section 17 of the Evidence Ordinance.

Having ascertained from the Chandu Officers, who had remained on guard at the Godown, that the car had not been interfered with in any way since Mr. Kandiah had boarded and stopped it, the Senior Customs Officer opened the luggage boot of the car, which was unlocked, and in it found two sacks containing 28 lbs. of opium.

The questions to be decided in determining this appeal are :—

(a) Was the confession made by the second appellant to Mr. Kandiah admissible in evidence?

(b) Was the confession made by the second appellant to the Senior Customs Officer admissible in evidence?

(c) If the answers to questions (a) and (b) are both in the negative, was there sufficient other evidence to prove that the appellants were in possession of this opium?

As to (a) — this depends first on section 25 of the Evidence Ordinance, which is as follows :—

> No confession made to a Police Officer who is below the rank of Inspector by a person accused of any offence shall be proved as against such person.

If Mr. Kandiah is to be regarded as a police officer below the rank of Inspector, which is the contention of Mr. Pooley, counsel for the second appellant, that confession is inadmissible.

In order to decide that it is necessary to refer to the provisions of the Opium and Chandu Proclamation No. 49, because it is under that Proclamation that the Senior Customs Officer and the other officers acted in their capacity as Chandu Officers.

By section 23 of the Proclamation :—

> 'Chandu Officer' means —
>
> (a) the Comptroller of Customs, any Deputy Comptroller of Customs, any Assistant Comptroller of Customs, any Senior Customs Officer or Customs Officers acting as such under the authority of the British Military Administration;
>
> (b) the Officer Commanding Civil Affairs Police and any Officer of the Civil Affairs Police not below the rank of Inspector; or
>
> (c) any Out-door Officer.

By the Transfer of Powers and Interpretation Ordinance, 1946, the expressions "British Military Administration" and "Civil Affairs Police Force" now refer to the Civil Government and the Civil Police Force, respectively.

By the same section of the Proclamation :—

> 'Out-door Officer' includes any Officer of Customs below the rank of Customs Officer and any Police Officer of the Civil Affairs Police below the rank of Inspector and any police constable of the Civil Affairs Police.

At the trial, Mr. Kandiah described himself as an Assistant Supervisor, Preventive Branch. That description being insufficient to show whether he comes within category (a) or (c) of the definition of "Chandu Officer" in section 23 of the Proclamation, we heard additional evidence under section 311 of the Straits Settlements Criminal Procedure Code.

The evidence was that of the particular officer concerned, Mr. V. Kandiah, of Mr. E. H. Hime, the Assistant Comptroller of Customs, Penang, and of Mr. D. W. Bigley, the Senior Customs Officer, Perak North, who was at the date of the offence acting Deputy Comptroller of Customs, Malayan Union. These last two witnesses both made it clear that "Customs Officer" is a recognised rank in the Customs service and that Mr. Kandiah does not hold or act in that rank, but is of a lower rank of the Customs Service. From the definition quoted above he would thus be an "Out-door Officer" for the purpose of the Chandu Proclamation, though it seems that he would not ordinarily be so described in his own service. Some confusion was introduced by the fact that in 1932 Mr. Kandiah was granted (and still exercises) the *powers* of a Senior Officer of Customs for certain purposes, and was at the time of the offence performing the duties of a Senior Customs Officer. It is clear, however, that he was never granted the *rank* of Senior Customs Officer, whether in a substantive or an acting capacity. We therefore hold that he is an "Out-door

Officer" and within category (c) of the definition of "Chandu Officer".

Mr. Pooley, counsel for the second appellant, contended that Chandu Officers are Police Officers because the Opium and Chandu Proclamation confers on them substantially the same powers as those possessed by Police Officers.

An examination of the provisions of that Proclamation reveals that Chandu Officers have the following powers :—

(a) powers of arrest without warrant — see section 11;
(b) powers of investigation, including penalties for any person who refuses to give information, or who gives false information, to a Chandu Officer — see section 12;
(c) powers of seizure — see section 17;
(d) powers of search — as regards this, a Chandu Officer who is an Out-door Officer must conduct the search under supervision of a Superior Officer — see Rule 3 of the Opium and Chandu Rules made under the Proclamation and published in the British Military Administration Gazette of the 1st February, 1946;
(e) powers to enter buildings — except for Out-door Officers — see Rule 5;
(f) powers to stop conveyances — see Rule 6;
(g) powers to act under search warrants — see Rule 7.

In addition, by new section 15A — see Gazette Notification No. 6005 of the 28th August, 1947 — Chandu Officers are given powers to prosecute. This amendment was not in force when the trial of the first and second appellants was commenced, but it must be mentioned because it is important when comparing the powers of Chandu Officers and Police Officers.

Therefore we have no doubt that a Chandu Officer, whether he comes within category (a) or (c) of the definition of "Chandu Officer" contained in section 23 of the Proclamation can exercise to all intents and purposes the material powers of a Police Officer. Following the principles laid down by the Court of Appeal in *Jubri bin Haji Salleh v. Public Prosecutor*[1], we decide that a Chandu Officer under the Opium and Chandu Proclamation is a Police Officer for the purpose of sections 25 and 26 of the Evidence Ordinance.

Mr. Wylie, Deputy Public Prosecutor, argued at length that the Indian cases, which establish that "police officer" should not be interpreted in the narrow sense, in fact decide only that a revenue or excise officer may be a "police officer", if he has the precise powers of a police officer under the Criminal Procedure Code expressly conferred on him by statute. This argument is at variance with the decision in *Nanoo Sheikh Ahmad v. Emperor*[3], which shows that the substantial nature of the powers exercised, and not their source, is the deciding factor. Mr. Wylie also sought to distinguish the Indian authorities on the ground that in this country "Police Officer" is defined in the Interpretation Ordinance (Cap. 2 of the Straits Settlements was in force at the time of the offence) in a manner which precludes its extension to cover a Chandu Officer. We do not accept that argument and should be prepared to hold, if necessary, that, in view of decided cases establishing the meaning to be given to the words "Police Officer" in section 25 — and section 26 — of the Evidence Ordinance, that definition does not apply for the purposes of these sections.

Mr. Wylie referred us to the decision in *Rasiah v. Public Prosecutor*[2], where Burton, J., with reference to section 25 of the Evidence Enactment, said, at page 48 :—

> I hold that in section 25 the words Police Officer should be confined to its natural meaning. It would I think be difficult to give it any other meaning in view of the divergence of our section from the Indian and especially the addition of the words 'who is below the rank of Inspector'. These words are totally inapplicable to Customs Officers.

But, under the Chandu Proclamation, it is clear from the definition of "Out-door Officer" that he is regarded as equivalent to a Police Officer below the rank of Inspector. Therefore that difficulty which Burton, J. had in the *Rasiah* case[2] is absent from this present case.

Moreover, and this is important, with the absolute prohibition on possessing or smoking chandu contained in the Opium and Chandu Proclamation, that Proclamation is purely penal. Therefore the Chandu Officers exercising powers under it do so in order to ensure that offenders against it are brought before the Courts for punishment.

On the other hand, the Customs law, which was the legislation considered by Burton, J. in the *Rasiah* case, is a Revenue law, which prescribes penalties for defrauding the revenue. Further, in the *Rasiah* case Burton, J. pointed out that the Excise Officers were exercising special powers of their own and were not performing Police duties.

Accordingly we distinguish *Rasiah v. Public Prosecutor (supra)* on those grounds.

Hence the provisions of section 25 of the Evidence Ordinance apply to the confession made by the second appellant to Mr. Kandiah, who is an Out-door Officer. Accordingly that confession should not have been

admitted in evidence at the trial. This disposes of question (a) set out above.

Now we proceed to deal with question (b), which is —

> Was the confession made by the second appellant to the Senior Customs Officer admissible in evidence?

As regards that question, a Senior Customs Officer comes within category (a) of the definition of "Chandu Officer" in section 23 of the Proclamation. It is clear from that definition, and from the definition of "Out-door Officer" in the same section, that a Senior Customs Officer, in his capacity as a Chandu Officer, is equivalent to a Police Officer not below the rank of Inspector. If, therefore, the second appellant had made a confession to the Senior Customs Officer whilst he, the second appellant, was not in custody, that confession would have been admissible in evidence.

But, in considering the confession made by the second appellant to the Senior Customs Officer in this case we must refer to section 26 of the Evidence Ordinance, which is as follows :—

> No confession made by any person whilst he is in custody of a Police Officer, unless it is made in the immediate presence of a Magistrate, shall be proved as against such person.

Reverting to the evidence, it is clear that before any statement had been made by the second appellant, both he and the first appellant were in custody.

It is true that neither the first nor second appellant had been actually arrested, when the second appellant made the confession to the Senior Customs Officer, but, from decided cases on the interpretation to be given to section 26 of the Evidence Ordinance, there is no doubt that "police custody" in that section means some form of restraint by the police on the movement of the person concerned, and is not restricted to custody after formal arrest. See, for instance *Hakam v. Emperor*[4], and *Pharbo v. Emperor*[5]. The test is — could the person concerned have walked away if he had wished to do so. This is well expressed in the local case of *Sambu v. Rex*[6].

Accordingly, since the second appellant was in custody when he made his confession to the Senior Customs Officer, and that confession was not made in the immediate presence of a Magistrate, it should not have been admitted in evidence at the trial. That disposes of question (b).

It is also beyond doubt that, if the confession made to Mr. Kandiah was not excluded by the provisions of section 25 of the Evidence Ordinance, it would still be inadmissible under section 26, on the ground that the second appellant was in police custody at the time of making it.

We would here point out that at the trial before the District Judge no objection was taken by Counsel for either the first or second appellant as to the admissibility of these confessions.

As regards the statement to the Senior Customs Officer, the evidence which later established that the second appellant was in custody at the time of making the statement had not been called when evidence of the statement itself was tendered. As regards the statement to Mr. Kandiah, it is to be remembered that it was denied. It therefore came as a surprise to counsel, and he was of opinion at the time that *Rasiah's* case[2] was authority for the admissibility of such a statement.

As regards question (c), apart from the statements of the second appellant, which we have held to be inadmissible, the case turns on the provisions of section 18 of the Proclamation. The section reads :—

> When in this Proclamation possession of anything constitutes an offence such possession shall include any custody or control of such thing and it shall not be necessary to prove that the person in possession of such thing was the owner of such thing or was aware of the nature quality or contents of such thing:
>
> Provided that:
>
> (i) no person shall be convicted of an offence under this Proclamation solely because he was in possession of anything if that person proves to the satisfaction of the Court that he was not aware of the nature quality or contents of such thing and that he came into possession and continued in possession of such thing in such circumstances as to have no reasonable cause to know or to suspect the nature quality or contents of such thing;
>
> (ii) if the possession alleged against the person charged is possession by a servant or agent of the person charged particulars of such possession must be included in the charge;
>
> (iii) no person in possession of anything as the result of exercising any powers conferred or executing any duty imposed upon him by this Proclamation shall be guilty of any offence by reason only of such possession.

Mr. Hume, for the first appellant, submitted that there is no evidence to prove that the first appellant knew the opium was in the luggage boot of car P.776 which he, the first appellant was driving. With that submission we agree. From that Mr. Hume argued that "possession" in section 18, which includes "custody or control", must be conscious possession, and consequently, since there is no evidence from which it can be reasonably inferred that the first appellant knew the opium was in the car, his conviction is bad.

Mr. Wylie argued that the mental element of possession does not enter into section 18 and that once possession, without any mental element is proved, the only means by which an accused can escape conviction is to bring himself within the provisions of the proviso to that section.

A line of local cases culminating in *R. v. Liew How Yeong*[7], has established that, in order to prove "possession" of opium or similar forbidden articles, it must be established affirmatively :—

(a) that the accused had actual or potential physical control thereof; and

(b) that he had the intention to exercise such control.

That case dealt with section 11 (3) (d) of the Straits Settlements Ordinance (Cap. 223), which reads :—

> No person shall, except as permitted by this Ordinance or by any rules made thereunder —
>
> .....
>
> (d) have in his possession, custody or control any chandu other than Government chandu.

We can find nothing in the wording of section 18 of the Proclamation to justify us in not following the decision in that and previous relevant cases.

If the Legislature intended section 18 to dispense with proof of the mental element of possession, they have failed to do so. From a careful examination of the provisions of that section it is clear that the first proviso thereto only provides for a person found in "possession" of a forbidden article escaping liability if he proves he did not know "the nature quality or contents" of it. Nowhere in the proviso is provision made for a person escaping liability if he proves he had no knowledge that the forbidden article was in his "possession". In a penal statute, such as this, it cannot have been the intention of the Legislature to punish persons, who can prove that forbidden articles under the Proclamation were in their "possession" without their knowledge.

We are fortified in this view by the amendment to sub-section (2) of section 3 of the Proclamation made by Gazette Notification No. 6005 of 1947. That amendment is as follows :—

> Any opium or chandu which is found on any part of any premises shall be deemed, unless the contrary be proved, to be in the possession of the occupier of such part of the premises.

No provision comparable to this applies to vehicles.

Accordingly, since there is no evidence whatsoever to prove that the first appellant knew he had possession, custody or control of this opium, his conviction cannot stand. His appeal is allowed and his conviction and sentence quashed.

As regards the second appellant we have already decided that the statements made by him to the Senior Customs Officer and to Mr. Kandiah are inadmissible. Apart from those statements there is no other evidence to support his conviction. Accordingly his appeal is also allowed and his conviction and sentence quashed. The order of forfeiture against his car P.776 is set aside and we order that the car should be returned to him.

Finally, we wish to stress that this decision turns on the particular provisions of the Opium and Chandu Proclamation.

Appeal Allowed.
Conviction and Sentence Quashed.

M. M. ALLY & CO. v. CHELLAMAH (f)

[App. Civil Juris. (Willan, C.J., Spenser-Wilkinson and Briggs, J.J.) October 1, 1948]
[Federation of Malaya — Civil Appeal No. 13 of 1948]

Contract Enactment (Cap. 52) Ss. 38 and 67 — Tender of rent — What constitutes a valid tender.

This was an appeal from the decision of Russell, J. (reported in (1948) M.L.J. 178) who dismissed an appeal from the District Judge, Kuala Lumpur. The main issue on appeal was whether rent due for the premises were in arrears and whether there had been a sufficient tender of rent by the tenants. The tenant in this case had previously sent the rent to the landlord but the landlord had refused to accept the rent. On the 28th of November 1946 the tenants wrote through their Solicitors a letter in the following terms:—

> "With reference to your letter dated 14th November 1946 our client informs us that he sent a Money Order for $50/- being rent for the month of April and May 1946 on the 11th of June 1946 with a covering letter which was returned to our client saying that your client refused to accept it. Again on the 15th of July 1946 our client sent a cheque for $25/- for payment of rent for the month of June. Again it was sent back to our client. Our client repeated this process for the months of July and August with similar results. Now if your client is agreeable and if she undertakes to issue receipts for payment of rent for the months from April to October 1946, we will send you back the said money order for $50/- and a fresh cheque for $125/-.
>
> As regards the repairs our client wrote to your client on the 11th of June 1946 informing her of the bad condition of the roof. This letter was returned to our client undelivered. Since receiving of that letter the condition has become worse. Our client has spent $112.70. This amount will have to be paid by your client."

Russell, J. held that this letter did not constitute a valid tender of the rent and he further held that as rent was in arrears the landlord was entitled to an order of possession for the premises. The tenants appealed against this decision.